No. 11832

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER WALKER COLGROVE, Trading and Doing Business Under the Firm Name of COLUSA REMEDY COMPANY, and COLUSA REMEDY COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

CLOSING AND SUPPLEMENTAL BRIEF.

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CLOSING AND SUPPLEMENTAL BRIEF.

With leave of Court, plaintiff and appellant files this Closing Memorandum.

We specifically call attention to the court's language of the injunction which is as follows:

> "Defendants were therein enjoined 'from introducing or delivering for introduction into interstate commerce, in any form or manner, the product known as "Colusa Natural Oil", or any like product, without a label containing specific directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is *prescribed, recommended,* **AND** *suggested,* in the advertising ma-

terial disseminated or sponsored by or on behalf of the defendants or either of them; which directions shall include the quantity of the dose (including quantities for [2] persons of different ages and different physical conditions) to be taken or applied in the treatment of each of such conditions, ills and diseases, as well as the recommended frequency and duration of administration or application of such dosage.'" (Emphasis ours.) [R. 2, 3.]

The judgment of the court, however, gives the following language:

"It Is Adjudged that the defendant has been convicted upon his *plea of not guilty,* after trial by the Court without a jury, jury trial having been waived by the defendant, of the offenses of on or about April 1, 1947, May 6, 1947, July 9, 1947, April 17, 1947, April 5, 1947, May 3, 1947, April 28, 1947 and April 2, 1947, having shipped in interstate commerce a product which failed to bear specific directions for use of the product in the treatment of all ills, conditions and diseases for which the product is prescribed *or* recommended *or* suggested in the advertising material disseminated and sponsored by the defendant and Colusa Remedy Company, a Nevada corporation; and in disregard of the injunctions issued February 24, 1947 and April 23, 1947 by this Court in cause numbered 5992-WM Civil, as charged in Counts One to Eight inclusive of the information; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted." [R. 36.]

It is respectfully submitted that although the injunction is in the *conjunctive,* the judgment is in the *disjunctive* and where the court's order covered the entire field, the judgment made it *disjunctive.* This alone should reverse the judgment.

Furthermore, we call attention of the Court to the language that the judge used at the time of the finding of "guilty." The Court said:

> "Mr. McGann:
>
> Now, those circumstances all point only in one direction, that this defendant in everything that he did, he acted in good faith and that he wanted to conform with this order of the court and not be in violation of it.
>
> The Court: The defendant is technically, literally correct in the literal reading of the restraining order, that the label be required to contain specific directions for the use of the product—I am abbreviating that—in the treatment of all ills for which such product is prescribed, recommended, and suggested.
>
> Read literally, the prohibition is against introducing into interstate commerce drugs which do not contain a label containing specific directions for its use in connection with all ills for which it is prescribed and recommended and suggested in the advertising material disseminated by the defendant.
>
> So, literally read, it is true that in order to violate the language of this injunction it would be necessary for the advertising material to prescribe and recommend and suggest the use of the product for the treatment of a conditon or an ill or a disease not referred to in the label. That, manifestly, is not the spirit of the injunction.

I think the injunction should, possibly, have been worded in the disjunctive instead of the conjunctive. It should have read 'conditions, ills, and diseases for which such product is prescribed or recommended or suggested in the advertising material,' but the manifest spirit must be read it in the disjunctive, because if the advertising material is prescribed, certainly prescription includes 'recommendation and the suggestion' and there would be no (30) meaning at all left for the words 'recommended and suggested' if the words were used alternatively. As I stated, 'prescribed' includes 'recommended and suggested.'

My view of it is that the defendant attempted to obey the words but not the spirit of the prohibition.

"With respect to Counts One to Eight, Counts One, Two, Three, Four, Five, Six, Seven and Eight, I find the defendant, Chester Walker Colgrove, guilty of contempt as charged. With respect to Count Nine of the information, I find the defendant, Chester Walker Colgrove, not guilty as charged." [R. 77, 78.]

It is therefore apparent that the Court's finding was not based upon the doctrine of *reasonable doubt,* nor any substantial evidence of *wilful* violation of the Court's decree. Section 386, Title 28, requires wilfulness to constitute Contempt of a Court decree. In an injunction case, a criminal contempt proceeding follows the same rules of evidence as in a criminal case and the evidence must be substantial and must sustain the determination

of the trier of the fact by evidence that establishes the *wilful* violation beyond a reasonable doubt. The evidence here clearly fails to do that. The pleadings also fail to allege.

United States of America v. United Mine Workers' of America, 330 U. S. 258;

Rumel v. U. S., 293 Fed. 532.

In *United States v. Balaban,* 26 Fed. Supp. 491, at 498, the court stated:

"In a proceeding for criminal contempt the presumption of innocence must be applied. The burden is on the government to prove the guilt of the defendants beyond a reasonable doubt. There is no shifting of the burden of proof. The defendants cannot be compelled to testify against themselves. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 444, 31 S. Ct. 492, 55 L. Ed 797, 34 L. R. A., N. S. 874."

"In a contempt proceeding, the Government must prove all the essential elements of the offense and guilt beyond a reasonable doubt."

United States v. Resnick, 299 U. S. 207;

Holt v. United States, 218 U. S. 245;

Agnes v. United States, 165 U. S. 36;

Alberte v. United States, 159 F. 2d 278.

I.

The Information Fails to Allege Wilfulness.

The charging part of the information is as follows:

"That on April 1, 1947, defendants shipped from Los Angeles, California, to said Schlintz Bros. Drug, Appleton, Wisconsin, a consignment of Colusa Natural Oil which bore labels reading in part as follows:

'A natural unrefined petroleum oil intended for use in the treatment of Psoriasis, Eczema, Athlete's Foot, and Leg Ulcers.

'Directions: Apply to affected parts and rub it in thoroughly morning and night. For open sores, saturate cotton pad with oil and bind on by gauze. Change to fresh dressing morning and night. For tender skin oil can be diluted 50% with olive oil. Continue treatment until skin is smooth and comfortable . . .'

That the advertisements alluded to in defendants' letter of April 2, 1947, appeared on April 24 and June 4, 1947 in the Appleton Post-Crescent, Appleton, Wisconsin, giving the name and address of Colusa Remedy Company and Schlintz Bros. Drug.

Said advertisements prescribe, recommend, and suggest Colusa Natural Oil as highly efficacious not only for psoriasis, athlete's foot, eczema, and leg ulcers (the four disease conditions mentioned on the label of said drug) *but also* for poison ivy, poison oak, bed sores, acne, ring-worm, scaley red face, burns, piles, and itch.

That the labels on defendants' product, as shipped to said Schlintz Bros. Drug, on April 1, 1947, disregarded the requirements of the aforesaid preliminary injunction since they fail even to attempt to bear specific directions for use of the product in the treat-

ment of all ills, conditions, and diseases for which the product is prescribed, recommended and suggested in the advertising material disseminated and sponsored by the defendants.

That by reason of the said shipment of April 1, 1947, the defendants are in criminal contempt of the preliminary injunction issued by this Court as aforesaid." [R. 4, 5.]

Title 28, Section 386, as it existed at the time of the alleged offenses, is as follows:

"§386. Contempts; when constituting also criminal offense. Any person who shall *willfully* disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as provided in sections 387-390 of this title. (Oct. 15, 1914, c. 323, §21, 38 Stat. 738.)"

Title 28, Section 387, as it existed at the time of the alleged offenses is as follows:

§387. Same; procedure; bail; attachment; trial; punishment. Whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person* has been guilty of criminal contempt, the court or judge thereof, or any judge therein sit-

ting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court. If the accused, being a natural person fail and refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

"In all cases within the purview of sections 381 to 383, 386 to 390 of this title, section 412 of Title 18, section 52 of Title 29 and sections 12, 13 and 14-27 of Title 15, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury for the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

"If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months. In any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be permitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance. (Oct. 15, 1914, c. 323, §22, 38 Stat. 738.)"

It will be seen, therefore, that neither the information charges nor does the evidence show any *willful* disregard of the injunction.

In speaking of the word "willful" in *Screws v. United States,* 325 U. S. 91-161, the court pointed out:

"And we are told 'wilfully' was added to §20 in order to make the section 'less severe.' 43 Cong. Rec., 60th Cong., 2d Sess. p. 3599.

"We hesitate to say that when Congress sought to enforce the Fourteenth Amendment in this fashion it did a vain thing. . . .

"We recently pointed out that 'willful" is a word 'of many meanings, its construction often being influenced by its context.' . . . But 'when used in a criminal statute it generally means an act done with a bad purpose.' *Id.,* 290 U. S. 394, 78 L. ed. 384, 54 S. Ct. 223. And see Felton v. United States, 96 U. S. 699, 24 L. ed. 875; Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 S. Ct. 144; Spurr v. United States, 174 U. S. 728, 43 L. ed. 1150, 19 S. Ct. 812; Hargrove v. United States (C. C. A. 5th), 67 F. (2d) 820, 90 A. L. R. 1276. In that event something more is required than the doing of the act proscribed by the statute. *Cf.* United States v. Balint, 258 U. S. 250, 66 L. ed. 604, 42 S. Ct. 301. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, *supra* (174 U. S. 734, 43 L. ed. 1152, 19 S. Ct. 812); United States v. Murdock, *supra* (290 U. S. 395, 78 L. ed. 385, 54 S. Ct. 223). And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 314 U. S. 513, 524, 86 L. ed. 383, 390, 62 S. Ct. 374."

Under the explanation of the word "willful" as defined in *Screws v. United States,* we must take it to apply to Sections 386 and 387, Title 28, which require not merely the doing of the act but the doing of the act *"wilfully."*

See *Stein v. U. S.*, 153 F. 2d 737, 743. We are confronted then in this case with the fact the Government neither alleged nor did it prove any disobedience nor any *willful* disobedience of the court's order. If the provisions of the court be deemed to be strictly within the requirements of the statute, it is that the product must contain a label with *adequate directions for its use.* There is nothing shown in the entire record that the labels were not *adequate* for its use.

The record clearly shows, without dispute, not only that the appellant did not act wilfully, as that term has been defined, but that they made a *determined and good faith effort* to comply with the court's injunction. Also, it appears without dispute that the labels contained adequate direction for uses of the product.

An information which fails to show "willful" violation where the statute requires willfulness fails to charge a public offense. Likewise, it would fail to charge contempt whereas here section 386 requires it.

It will be noted that in the case of *United States v. United Mine Workers of America,* 330 U. S. 298, 91 L. Ed. 915, there is a footnote to the case which says:

> "Noteworthy also is the allegation in the affidavit that the defendants' violation of the restraining order 'had interfered with this Court's jurisdiction.' And the charge in the petition of *'willfully* . . . and *deliberately,'* disobeying the restraining order indicates an intention to prosecute criminal contempt."

II.

The Record Clearly Shows, Without Dispute, That Appellants Made a Determined and Good Faith Effort to Comply With Injunction.

The record shows, without contradiction, that immediately after the issuance of the injunction involved in this case, appellants went to considerable trouble and expense in their efforts to rearrange their labeling so as to comply with the court's decree. The undisputed testimony of Mr. Colgrove reflects this phase:

> "But certainly I acted in the best of faith as far as trying to conform that advertising with the injunction decree and in every act in the conduct of the business, even to the extent of suspending all intrastate shipments as well as interstate shipments following the decree until new labels were printed to conform with the decree, ordering back merchandise that could have been sold in the states from which it was returned without violation of the injunction, but at a cost of several hundred dollars. In order to comply, in good faith, I wanted it returned and relabeled; and that is about all there is to it.
>
> Q. There was no intent on your part at any time to violate this injunction? A. Positively not.
>
> Q. You did everything you felt that was in your power towards conforming with it? A. I did." [R. 63.]

The essence of contempt is, of course, *the willful or deliberate violation of the court's decree.*

> "To constitute criminal contempt acts of disobedience must be characterized by deliberate intention to

defy the authority of the court. The act must be done wilfully and with the intention to show disrespect for the defiance of the court. Intent is an essential element of the criminal contempt." (Dangel on Contempt, p. 75.)

In *United States of America v. United Mine Workers of America,* 330 U. S. 258, 91 L. Ed. 884, the court in pointing out the procedural steps taken in that case, the court there found the defendants "guilty beyond a reasonable doubt." (330 U. S. 269, 91 L. Ed. 900.)

The court also found a "wilful and intentional" flaunting of the court's order and no attempt whatsoever to make any compliance with it.

III.

No Flaunting of Court's Order or Any Willfulness Proved.

Certainly, under the facts clearly shown in this case, it cannot properly be said that there was any proof of any such a flaunting or disregard for the court's decree. To the contrary, the record plainly reveals absence of wilfulness and a good faith effort to comply with it.

And, in this connection, it should be remembered that the lower court, in requiring appellants to change their labels, did not map out or specify the manner in which this should be done, or lay down any definite standards or criteria to guide the appellants in doing this. The injunction decree was quite general. In short, appellants had to use their own judgment in determining how just to meet the requirements of this indefiniate decree. The record shows that they did make a conscientious effort to do so.

Furthermore, any suggestion or intimation that appellants deliberately schemed to evade and defy the court's decree, becomes, we respectfully submit, patently fatuous when it is realized that there was absolutely no motive or reason for any such conduct. Why would appellants do such a thing and risk the penalties of a criminal contempt when they had nothing whatsoever to gain by such conduct. All they had to do (according to the government's theory of this case), in order to comply with the injunction, was simply to add the names of the alleged "omitted" diseases (poison oak, etc.) to the label. It is conceded by the government that the "directions for use" on the label, psoriasis, eczema, athlete's foot and leg ulcers, *are entirely adequate insofar as the diseases named on the label are concerned.* What the government complains of is that appellants named diseases in their advertising material which were not named on the label. Certainly, it would seem to be the height of folly, to put it mildly, for appellants to risk the severe penalties of contempt when the whole matter could have been readily resolved by a few printed words on the label of the names of skin ailments.

It is contended that if the names were added that the directions already on the label of the bottle were not inadequate. It is merely contending that these additional ailments in the testimonial in the newspaper advertising were not on the label. Congress did not require that the label contain the names of the ailments particularly. All that it requires is that *adequate* directions be required for their uses.

IV.

The Question Here Is Whether Newspaper Advertising in Testimonials Constitute "Labels" or Come Within Its Orbit?

This case does not merely involve the single issue of whether the defendant was guilty of violating a court order and therefore in contempt but involves a question of newspaper advertising, of the character here involved, as it affects the Pure Food and Drug Statute.

If the statute is to be construed as intended by the appellee, then every label in any cosmetic case would have to contain every kind of directions for every powder puff that was advertised in any newspaper and a letter appraising some kind of powder puff, and a testimonial published in a newspaper would require the seller of that product to put a label on that bottle telling the woman just how to use the puff to powder her face, and if somebody inadvertently said she used the puff for shiny skin the bottle, under the authority of the appellee, would have to designate "shiny skin" because someone had written a testimonial in a newspaper about its use for that purpose.

We do not believe that Congress intended, nor does the Statute say, that the label must contain the name of every use for which the product is intended. All that the statute intends is that the label contain adequate directions for its use, even though the label does not specify any uses.

Here, the label specified the distinct use with directions thereon for its use and it was conceded by the Government during the oral argument that the label contained adequate directions for every use specified on the bottle

itself, and that the label was adequate for those uses, to wit, Eczema, Psoriasis, Athlete's Foot and Leg Ulcers. No question is raised by the Government in the oral argument as to the good faith of the appellant in respect to these four items. It is conceded that he showed every good faith. But by innuendo indirections and matters not referred to in the record of the case itself, the Government counsel (not the attorney who argued) had attempted to inject matters outside the record. We think this is unfortunate and unfair, but, this court consisting of learned judges, we know that such tactics as usually resorted to before a jury will not be considered by this court.

It would have been a simple matter for the appellant, who spent thousands of dollars recalling his product, to relabel it to add the other names set out in the newspaper testimonials as to the efficacy of the product. No challenge is here made as to the truthfulness of those advertisements for it cannot be. They have appeared in newspapers for years and withstood the acid test of the Federal Trades Commission and the Post Office Department. If they were false, the statutes of those two departments would have covered the matter. The presumption is that they have performed their duties and that the product has done all that the advertisement said.

Therefore, the only questions left are whether testimonials printed in a newspaper regarding the product are "prescribing, recommending and suggesting its uses where the label specifies its uses for four products and where the label gives adequate directions for its uses regardless of whether the label itself specifies the uses named in the testimonials, and further whether those uses are in any event merely specific applications of the generic term for which the use is designed.

V.

Newspaper Advertising Is Not "Labeling." The Solicitor General so Stated Before the United States Supreme Court in Another Case.

The statute under the authority of which the injunction was issued provides as follows:

> "Section 301(a) of the Act, 21 USCA, §331(a), 5 FCA, Title 21, §331(a), prohibits the introduction into interstate commerce of any drug that is adulterated or misbranded. It is misbranded according to §502(a), 21 USCA, §352(a), 5 FCA, Title 21, §352(a) if its 'labeling is false or misleading in any particular,' unless the labeling bears 'adequate directions for use.' §502(f). The term labeling is defined in §201(m), 21 USCA, §321(m), 5 FCA, Title 21, §321(m), to mean 'all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article'."

The first question here involved is whether testimonials contained in a newspaper advertisement published in newspapers of the city where the article is to be sold, comes within the definition of a "label" within the meaning of the Act. And, therefore, whether the Court has any jurisdiction, either of the whole newspaper ad or that portion which relates merely to testimonials.

The subject of "labeling" was fully discussed before the United States Supreme Court in the case of *Kordel v. United States,* decided by the Supreme Court November 22, 1948, 93 L. Ed. (Adv.) 74, in which the Court held that "literature that was used in the sale of the drugs, which explained their uses and where the purchaser was

advised not to use them, and constitute an *essential* supplement to the label attached to the package was labeling within the meaning of the Act." And, in arguing that case before the Supreme Court of the United States attention was called to the Supreme Court that this *advertising* as such was eliminated from the bill in the historic consideration of it before its passage.*

The Government has confused newspaper advertising with labeling, but newspaper advertising is not within the sphere or scope of the act, nor is it within the congressional intent. The earlier drafts of the pure food and drug act introduced into Congress contained the following definition distinguishing the two concepts. Thus, S. 2800 contained the following definitions distinguishing the two concepts:

> "Section 2. As used in this act, unless the context otherwise indicates—
>
> * * * * * * * * *
>
> (i) The term 'labeling' includes all labels and other written, printed, and graphic matter, in any form whatsoever, accompany any food, drug, or cosmetic.
>
> (j) The term 'advertisement' includes all representations of fact or opinion disseminated in any manner or by any means other than by the labeling."

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*At the time the Supreme Court of the United States decided *Kordel v. United States,* 93 L. Ed. 74, it also decided *United States v. Urbuteit,* 93 L. Ed. 79. This case involved statements that were false and misleading. The Government stated, in oral argument they did not believe this case particularly in point. We agree but we cite it for the court's information as we did in the oral argument.

(Reprinted in full in Hearings Before the Committee on Commerce, United States Senate, 73d Cong., 2d Sess., pp. 1-12.)

This definition was not included in the statute as finally passed. The final bill, as amended, omitted the advertising provision. Congressional intent is evident from the debate in the House of the first S. 5 (80 Cong. Rec. 10230-10244, 1936) and on the final measure (83 Cong. Rec. 391-424, 1938) and in the Senate on the conference report (83 Cong. Rec. 3287-3293, 1938).

VI.

Newspaper Advertising Only Under Control of Federal Trade Commission.

Thus the control of advertising has been left clearly to the Federal Trade Commission and although there have been repeated efforts in Congress by the Food and Drug Administration to include newspaper advertising, as such, within its orbit. That effort has been rejected by Congress. Such decisions of Congressional action are important.

Section 12 of the Federal Trades Commission Act, Public Law 203, 63d Congress, as amended by 7th Congress, 52 Stat. 114; U. S. C. 15:42, provides as follows:

> "Sec. 12. False Advertisement of Foods, Drugs,, Devices or Cosmetics as Unfair or Deceptive Act of Practice and Unlawful. (52 Stat. 114; U. S. C. 15:42).
>
> Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination of the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5."

Section 15 of the Act provides in part as follows:

"Sec. 15. 'False Advertisement,' 'Food,' 'Drugs,' 'Devices,' 'Cosmetics,' Defined. (52 Stat. 116; U. S. C. 15:55.)

Sec. 15. For the purposes of sections 12, 13 and 14—

(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug

shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

Congress, not having placed newspaper advertising within the jurisdiction of the Federal Trade Commission and not within the jurisdiction of the Pure Food and Drug Administration, it is clear that newspaper advertising was never intended to come within the jurisdiction or scope of the Commission or any orders pursuant to its request. And, since counsel for the Pure Food, Drug and Cosmetic Administration have gone outside the record of this case to attempt to malign the appellants, we deem it appropriate to reply that Colusa Mineral Oil has been on the market seven years, has been thoroughly checked by Federal Trade Commission. The Federal Trade Commission has not at any time ever instituted a complaint or cause of action against the appellants.

The law presumes that Federal Trade Commission has been doing its duty as fully as has the Pure Food, Drugs and Cosmetic Administration. We mention this because of the comment (though withdrawn) made by a learned member of the court but which might have been evoked by statements made by Government counsel in their brief which were outside of the record and not properly within the scope of this appeal.

The Government concedes, as it must, that the bottles were correctly labeled for the uses intended for the matters stated on the label, to-wit, eczema, psoriasis, athlete's foot and leg ulcers.

It therefore is apparent that the court was without jurisdiction to make the order with reference to newspaper advertising and that the order was wholly void.

This interpretation was placed upon the law by the Solicitor General himself in the argument on the *Kordel* case. In his argument Mr. Perlman, the Solicitor General, referred to the definition of advertising which was deleted from one of the earlier food and drug bills. Mr. Perlman then stated, "that the advertising which Congress had in mind when it transferred jurisdiction to the FTC was that found in newspapers, periodicals and radio commercials. This type of advertising, he contended, is entirely different from the labels, circulars and other printed matter used in connection with drugs or devices and designed to mislead and defraud the general public." (16 Law. Week. 3108.)

We agree with the Solicitor General's argument before the Supreme Court of the United States. Such argument removed the jurisdiction of the District Court to issue the injunction here.

Here the advertisements in question did not perform the function of labeling. The bottles had labels on them which contained adequate directions for the use of the preparation. [R. 22.] The bottle was labeled. All that the Act requires is "adequate directions for the use of the product." It does not require naming any or all of the uses of the product—all it requires is adequate directions for the use of the product.

Nowhere in the evidence is there any showing that the directions contained on the label were not "adequate in every way" for all of the possible uses of the products.

It is conceded by the Government that the label on the bottle was fully adequate in the treatment of Psoriasis, Eczema, Athlete's Feet and Leg Ulcers, for which the bottle was adequately labelled and designated, and the efficacy of the remedy and its proper uses are not challenged for these particular specifically named items. But, nowhere in the evidence has there been any showing that even if the items be expanded to include other types of skin suffering that the label was not adequate and therefore that the injunction had been in any way violated.

The injunction in requiring specific directions and the judgment in punishing the defendant for failing to bear "specific directions" also was beyond the scope of the statute. or the court's jurisdiction of the subject matter.

VII.

The Court Was Without Jurisdiction to Make the Order.

During the oral argument, we raised the point that the court was without jurisdiction to make the order regarding newspaper advertising and therefore there was no jurisdiction of the subject matter and therefore there could be no contempt. Citing *Re Sawyer,* 124 U. S. 200, 31 L. Ed. 402; *Ex parte Fisk,* 113 U. S. 713, 28 L. Ed. 1117; *Ex parte Rowland,* 104 U. S. 604, 26 L. Ed. 861; *Beauchamp v. United States,* 76 F. 2d 663.

The learned Chief Judge called our attention to the case of *United States v. United Mine Workers of America.* That case does not vitiate the doctrines herein set out, but in fact re-affirms them. (330 U. S. 291.) The *Mine Workers* case merely held that where an injunction is issued by a court having jurisdiction of both the person and

the subject matter that the party attempting wilfully to disobey such an order did so at their peril if their disobedience was based on a belief that the law is unconstitutional. That case involved the question of the validity and application of the Norris-LaGuardia Act and the War Labor Disputes Act.

In the *United Mine Workers'* case, the court said:

> "In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants in making their prior determination of the law, *acted at their peril.*"
>
> **"Although a different result would follow were the question of jurisdiction frivolous and not substantial, such contention would be idle here."**

The court further said that there was a duty of obedience "where, as here, the *subject matter of the suit,* as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt." This is not true, however, in the present case where the court never did have jurisdiction to issue an injunction under the Pure Food, Drugs and Cosmetics Act applicable to and affecting newspaper advertising and not within the scope of the suit and, therefore the subject matter was never within the jurisdiction of the District

Court. Under such circumstances, the order was void and could be disregarded as a void order.

Beauchamp v. United States, 76 F. 2d 663, 9th Cir. Ct.;

United States of America v. United Mine Workers' of America, 330 U. S. 258;

Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117;

Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861;

Re Sawyer, 124 U. S. 300, 31 L. Ed. 402.

We do not, in urging this point, say that the appellants here at any time chose to disregard the court's order because they thought it void. On the contrary, they made every effort to obey the order, even though it was void by having been charged with contempt for failure to comply with the order. We submit that the court never did have jurisdiction to make the order and that, as construed by the court, in the last proceeding, such construction included a subject matter not within the jurisdiction of the trial court, or in the action herein had.

As to the power of the court to punish for contempt: In considering whether the punishment could be divisible and charged as several contempts, it must be born in mind this is not a case where one is charged with several violations of a statute but is charged with a violation of a court decree or injunction. It the *Mine Workers'* case the matter was judged as a single contempt although the strikers continued for 15 days to disobey the injunction of the court.

VIII.

There Has Not Been the Slightest Showing in This Case That the "Directions for Use" on the Labels in Question Were Not Adequate for the Treatment of the "Omitted" Diseases (Poison Oak, etc.).

The government's entire case is predicated upon a false premise, as stated above. The basic assumption underlying this entire proceeding is the government's claim that appellants were in violation of this injunction because they did not list *on the bottle label the names of these several "omitted" skin ailments (poison oak, etc.), i.e.,* the diseases mentioned in the testimonials but not on the label. In other words, the government proceeds upon the theory that this injunction required that the names of all the diseases for which this drug is "prescribed, recommended and suggested" *be printed on the label.* The following statement of the government's counsel (printed at page 19 of our Opening Brief) well illustrates and epitomizes this basic concept of the government:

> "The Court: Is it the Government's contention that this advertisement becomes in effect a part of the label.
>
> Mr. Klinger: Not necessarily a part of the label, Your Honor, no; but it is in conflict with the court's order heretofore entered, which is, pursuant to the statute, that the defendants are not, *in their advertising,* after those injunctions, to recommend, suggest or prescribe this product *for any conditions, any of the disease conditions other than those named on the label."* (Emphasis ours.) [R. 53.]

The following remark of the lower court sums up this basic idea of the government:

"The Court: The entire complaint here is that they were not included." [R. 74.]

This basic premise of the government is, we respectfully submit, absolutely unsound, as we will try to quickly again demonstrate. The injunction did *not* require that *the label* contain the names of all the various ailments for which this drug is "prescribed, recommended and suggested" *in the advertising material.* All that the injunction requires is that *the label* contain *adequate (or specific directions* for use of this drug in the treatment of the diseases for which the drug is "prescribed," 35c.) *in the advertising materials of the defendants.*

Now, it would seem almost elementary, we respectfully submit with all due deference, that in order to prove a violation of this injunction the most vital and indispensable part of the government's case and proof would be to prove that the "directions for use" admittedly on this label were *not adequate* in the treatment of these "omitted" diseases (poison oak, etc.). In other words, it is *the absence of adequate directions* which is the very essence of the alleged violation. No proof whatsoever, was made that the directions in question were *not* adequate for these diseases.

Stating the matter a little differently, it would not even be necessary, under this decree, that any of the diseases for which this drug is "prescribed," etc., be actually named *on the label.* This naming and "prescribing" for example, could be done in the advertising material and if, in fact, the directions for use on the label are adequate, there could and would be no violation of this decree.

Repeating, in our case, there was not the slightest proof that the directions for use were or are *not* adequate for these "omitted" diseases.

The simple and indisputable *truth is that these directions* were and are entirely adequate. *The oil is used and applied, in the* treatment of these several ailments (poison oak, etc.) in exactly the same way as in the treatment of the several diseases named on the label, as to which diseases the government concedes the directions for use are entirely adequate.

The burden was, of course, upon the government to prove every essential element of this serious criminal charge by competent evidence and beyond a reasonable doubt. This necessarily means that the burden was upon the government to show, by proper evidence, that the directions for use were *not* adequate in the treatment of the "omitted" diseases. The govenrment failed completely to prove any such a thing.

1. The record plainly shows a good faith effort by appellants to comply with this decree even though void for want of jurisdiction of the subject matter of advertising. Hence there was no contempt.
2. Appellants did not violate this injunction because:
   A. They did not "prescribe, recommend and suggest" this drug for the "omitted" diseases.
   B. These diseases are mere forms of skin suffering and come within the definitions of the generic terms on the label. The government failed to prove otherwise. In any event the "directions for use" were and are adequate for treatment of these "omitted" diseases.
3. The government wholly failed to show that the "directions for use" on these labels were not adequate in the treatment of these omitted skin diseases.

Conclusion.

1. The order of the court was not violated. The order was in the conjunctive and the judgment, contrary to the order, was in the disjunctive.

2. The information did not charge wilful violation as required by the statute regarding contempt.

3. There was no proof of willfulness. There was no proof of any violation beyond a reasonable doubt.

4. The statute only requires adequate directions for use. There was no showing that the directions for uses were not adequate.

5. Newspaper advertising is not within the scope and jurisdiction. The court therefore acted beyond his jurisdiction of the subject matter and its order was therefore in fact void.

6. Contempt for an order of the court has not been made divisible by the Act of Congress.

For which lack of jurisdiction and error, we respectfully pray for reversal of the judgments.

Respectfully submitted,

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